Supreme Court, U. S.
FILED
DEC 22 1976
MICHAEL RODAK, JR., CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-860

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JOHN A. JOBST

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court on remand (App. A, *infra*, pp. 1a-4a) is not yet reported. The earlier opinion of the district court (App. B, *infra*, pp. 5a-17a) is reported at 368 F. Supp. 909.

JURISDICTION

The judgment of the district court, reinstating its earlier judgment declaring Sections 202(d)(1)(D)

and 202(d)(5) of the Social Security Act unconstitutional as applied to appellee, was entered on July 27, 1976 (App. E, *infra*, pp. 23a-24a). A notice of appeal to this Court (App. C, *infra*, pp. 18a-20a) was filed on August 24, 1976. On October 13, 1976, Mr. Justice Blackmun extended the time for docketing the appeal to and including November 22, 1976, and on November 15, 1976, he further extended the time to and including December 22, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Sections 202(d)(1)(D), 202(d)(5), and 202(s)(2) of the Social Security Act, which provide that secondary social security benefits received by a disabled dependent child of an insured wage earner shall terminate when the child marries an individual who is not entitled to benefits under the Act, are consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be • • • deprived of • • • property, without due process of law • • •.

The relevant provisions of Section 202 of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. (and Supp. V) 402, are set forth in App. D, *infra*, pp. 21a-22a.

STATEMENT

1. Under Section 202(d) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. (and Supp. V) 402(d), child's insurance benefits are provided to the dependent children of wage earners who receive old-age or disability benefits or who died fully or currently insured under the Act.[1] To be entitled to child's insurance benefits, the dependent child at the time of his application must be unmarried and either under 18 years of age (or a full time student under age 22) or under a disability which began before he attained age 22. Section 202(d)(1)(B) of the Act, as amended, 42 U.S.C. (Supp. V) 402(d)(1)(B).

Section 202(d)(1)(D) of the Act, as amended, 42 U.S.C. (Supp. V) 402(d)(1)(D), provides that child's insurance benefits shall terminate when the child marries. There is, however, a limited exception to this general provision for a disabled child who marries an individual also entitled to one of several categories of insurance benefits under the Act. Sections 202(d)(5) and 202(s)(2) of the Act, 42 U.S.C. (and Supp. V) 402(d)(5) and 402(s)(2).[2] But a disabled child who marries an individ-

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[1] Child's insurance benefits, like the other categories of benefits paid to members of the wage earner's family under Title II of the Act on the basis of the wage earner's primary social security account, are referred to as "secondary" insurance benefits.

[2] Section 202(d)(5) on its face appears to state a general rule applicable to all dependent children, but Section 202(s)

ual who is not entitled to benefits under the Act falls outside that exception; that disabled child's benefits, like those of nondisabled children, are terminated by marriage.

2. Appellee John A. Jobst, who has been disabled since birth from cerebral palsy, was awarded child's insurance benefits in 1957, at age 25, upon the death of his father, who had been an insured wage earner under the Act (Tr. 61). In 1970 appellee married a person who likewise suffered from cerebral palsy but who was not entitled to child's insurance or any other form of benefit under Title II of the Act (Tr. 36, 37). Because of this marriage, appellee's child's insurance benefits were terminated by the Secretary pursuant to Section 202(d)(1)(D) of the Act (Tr. 7; see Tr. 63).

After exhausting his administrative remedies, appellee instituted this action in the United States District Court for the Western District of Missouri to review the Secretary's termination of his benefits. On January 14, 1974, the district court held that Sections 202(d)(1)(D) and 202(d)(5) of the Act—the termination provision and the limited exception thereto—are unconstitutional "as applied to child's insurance beneficiaries who marry totally disabled persons who do not receive child's insurance benefits" (App. B, *infra*, p. 17a). The court reasoned that these statutory provisions violated the equal protec-

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(2) narrows the application of that rule to dependent children who are disabled.

tion principles that inhere in the Due Process Clause of the Fifth Amendment because there was "[n]o rational basis" for the statutorily created "distinction between beneficiaries who marry disabled persons who do receive benefits and beneficiaries who marry disabled persons who do not receive benefits" (App. B, *infra*, p. 13a). The court declared the statutory provisions unconstitutional and remanded the case to the Secretary "with the * * * direction that [appellee's] claim be allowed" (App. B, *infra*, p. 17a).

3. The Secretary appealed directly to this Court (No. 73-1758). The jurisdictional statement pointed out (pp. 7-8) that since January 1, 1974, appellee and his wife had been receiving a monthly benefit of $210 under the newly enacted program of Supplemental Security Income for the Aged, Blind, and Disabled, Title XVI of the Social Security Act, as added by the Social Security Amendments of 1972, 86 Stat. 1329, 42 U.S.C. (Supp. V) 1381 *et seq.*, and that that amount was only approximately $20 per month less than the combined amount appellee and his wife would have received under both the child's insurance and the supplemental security income provisions of the Act had appellee remained entitled to child's insurance benefits. The change in appellee's circumstances caused by the enactment of the supplemental security income program was not a part of the record before the district court when it had rendered its decision. On October 15, 1974, this Court vacated the judgment of the district court and remanded the

case for reconsideration in light of the new program. 419 U.S. 811-812.

On remand, the district court held that the supplemental security income program "simply had nothing to do with the questions presented" in this case (App. A, *infra*, p. 3a). The court therefore reinstated its original judgment of January 14, 1974, holding Sections 202(d)(1)(D) and 202(d)(5) unconstitutional as applied (App. A, *infra*, p. 4a).

THE QUESTION IS SUBSTANTIAL

This case presents an important question regarding the constitutional validity of the system chosen by Congress for allocating secondary benefits under the Social Security Act. Several other secondary insurance benefits, in addition to child's insurance benefits, require as a condition of eligibility that the beneficiary be unmarried (or an unremarried widow, widower, or divorcee);[3] generally speaking, those benefits are terminated when the beneficiary marries or remarries.[4] For each of these benefit categories, however, there is a limited exception in favor of beneficiaries who marry individuals who themselves are secondary beneficiaries under the Act.[5] Thus,

[3] See Sections 202(b)(1)(C) (divorced wives), 202(e)(1)(A) (widows), 202(f)(1)(A) (widowers), and 202(g)(1)(A) (surviving or divorced mothers).

[4] See Sections 202(b)(1)(H), 202(e)(1), 202(f)(1), and 202(g)(1). See also Section 202(h)(1)(C) (parents). But see Sections 202(e)(4) and 202(f)(5).

[5] In addition to the statutory provision involved in this case, Section 202(d)(5), see Sections 202(b)(3), 202(e)(3), 202(f)(4), 202(g)(3), and 202(h)(4).

this case involves a principle that has general applicability under the Social Security Act, even though the district court's opinion is directly concerned only with child's insurance benefits. Moreover, the holding that the exception to the general termination rule is unconstitutionally narrow reflects a misunderstanding of the rationale underlying the legislatively chosen method of allocating secondary benefits and rests upon a misapplication of the requirements of the Due Process Clause.

1. When the child's insurance provisions were first adopted, there was no exception to the general rule that benefits under those provisions terminate when the child marries. 53 Stat. 1364-1365. This general rule itself is rational. Child's benefits, like other forms of secondary insurance under the Act, were established "to afford more adequate protection to the family as a unit." H.R. Rep. No. 728, 76th Cong., 1st Sess. 7 (1939). See also *Mathews* v. *de Castro*, No. 75-1197, decided December 13, 1976 (slip op. 5). Benefits were provided to the wage-earner's dependent children as a means of replacing the support lost by those children as a consequence of the wage-earner's death, disability, or retirement. See *Mathews* v. *Lucas*, No. 75-88, decided June 29, 1976 (slip op. 12).[6]

[6] The provision of benefits on the basis of the wage-earner's social security account also was viewed as helping to preserve the wage-earner's role as a provider and to sustain the child's sense of security in the family as a unit. Hearings on the Social Security Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess. 32-33 (1939).

Normally, upon marrying a child departs from "the family as a unit" and establishes a new family. As a general matter, married children are considerably less likely than unmarried ones to be dependent on their parents for the provision of their essential economic needs and are therefore correspondingly less likely to be significantly affected, in terms of support, by the continuing fact of the wage-earner's death, disability, or retirement. In short, in ordinary circumstances marriage significantly reduces or terminates the special need for support. Congress reasonably determined that a child who marries removes himself from the class of individuals for whom secondary benefits were designed, and it therefore provided that children lose their entitlement to child's insurance benefits at the time of marriage. Section 202(d)(1)(D) of the Act.[7]

In holding this statutory provision unconstitutional as applied in the circumstances here, the district court in essence disapproved of Congress' extrapolation from a general observation of human experience—that marriage normally results in the establishment of a new, self-sufficient household—to a broad bar on the payment of benefits to most married children of the wage-earner. The court's analysis rests upon the fact that some beneficiaries, themselves incapable of gainful employment, may

[7] For the same reasons, Congress provided that a child of a deceased, disabled, or retired wage-earner is eligible to receive child's insurance benefits only if he is unmarried at the time his application for benefits is filed. Section 202(d)(1)(B).

"marr[y] * * * person[s] who can not provide a source of support" (App. B, *infra*, p. 14a) and that such individuals would in fact remain dependent upon the wage-earner, or the secondary benefits payable on his account, for support. Yet a holding of unconstitutionality based upon that particularized concern contravenes the principle, which the court recognized but did not apply, "that a classification may not properly be held to violate equal protection principles because it 'is not made with mathematical nicety or because in practice it results in some inequality' " (App. B, *infra*, pp. 12a-13a).

The district court's approach would require Congress to abandon the use of broad, experientially based assumptions in the Social Security Act, in favor of an individualized means test for determining continued eligibility for secondary benefits. But such a result is not required by the Due Process Clause. Congress may constitutionally allocate secondary social security benefits on the basis of an individual's membership in the primary beneficiary's family unit, and may deny or terminate benefits when the individual separates from that unit. See *Mathews* v. *de Castro*, *supra*. Furthermore, Congress need not require a case-by-case determination of actual dependency upon the wage-earner, but may allocate benefits on the basis of the relative likelihood of dependency. *Mathews* v. *Lucas*, *supra*.

That is what Congress has done in the case of child's insurance benefits. Congress has determined that it is sufficiently probable that marriage termi-

nates the relationship of dependency to warrant termination of benefits upon marriage.[8] Such general, categorical assumptions about dependency and need conduce to the efficient administration of the program, and they afford a constitutionally permissible basis upon which to allocate secondary social security benefits. The assumption that married individuals are not dependent upon their parents for essential economic support, "though [it] may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, [is] permissible under the Fifth Amendment * * *." *Mathews* v. *Lucas*, *supra* (slip op. 13-14). See also *Weinberger* v. *Salfi*, 422 U.S. 749.

2. In Section 202(d)(5) of the Act, Congress has provided, for disabled children (see note 2, *supra*), a limited exception to the general rule that marriage causes a termination of child's benefits. That exception is part of a series of amendments to the Act in 1958 in which Congress provided for the continuation of certain secondary benefits when the beneficiary marries an individual who also is entitled to secondary benefits, 72 Stat. 1030 (see p. 6 and n. 5, *supra*). The purpose of these amendments is explained in the legislative history (H.R. Rep. No. 2288, 85th Cong., 2d Sess. 18 (1958)):

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[8] Congress made a similar determination with respect to age: benefits terminate when the child reaches age 18 (or in the case of a student, age 22), except for disabled children, who "are as dependent on their parents after attaining age 18 as before * * *." S. Rep. No. 2133, 84th Cong., 2d Sess. 2 (1956).

> When a secondary beneficiary marries, such person's benefit is terminated under present law. * * * [I]f the new spouse is also receiving a secondary benefit, the benefits of both are terminated and ordinarily neither beneficiary can become entitled to any new benefits. Your committee's bill would eliminate the hardship in these cases by providing that marriage would not terminate a benefit where a person receiving mother's, widow's, widower's, parent's or childhood disability benefits marries a person receiving any of these benefits * * *.[9]

This explanation confirms what is apparent from the statutory language: in enacting a limited exception to the general marriage bar, Congress was specifically and exclusively concerned with the consequences under the Act of a marriage between two social security insurance beneficiaries. Congress reasonably determined that a marriage between individuals both receiving insurance benefits under the Act would not ordinarily result in the elimination or reduction of the probable need of such individuals. Congress therefore amended the Act to prevent the substantial reduction in, or termination of, benefits of families that could be presumed to be exclusively dependent upon primary or secondary social security insurance benefits for support.

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[9] In addition, Congress provided for the continuation of child's benefits when the disabled beneficiary marries a person receiving old-age or disability benefits. See Section 202(d)(5). See also Section 202(g)(3) (mother's benefits).

The rationale of those amendments does not extend to appellee's case. Since appellee did not marry another social security insurance beneficiary, his new family was not presumptively exclusively dependent upon primary or secondary insurance benefits for support.

The district court ruled, however, that because appellee married another disabled individual, who in fact was unable to support him, appellee's need continued and therefore, as a constitutional matter, his benefits also must continue. But there was a sound basis for Congress' decision to limit the exception to the marriage bar to marriages between social security insurance beneficiaries. The marriage between such beneficiaries presents a unique and readily identifiable situation that Congress could easily treat within the Act's existing benefit structure.

Other marriages present a substantially different problem. Within the narrow frame of reference provided by the social security insurance benefit program, there is no way to identify in which of those marriages the beneficiary's need for support continues. If Congress sought to meet specific instances of continued need, it would be forced to proceed in either of two ways.

It could utilize broad presumptions, such as the presumption that a beneficiary's marriage to a welfare recipient affords no occasion for a termination of benefits. But such an approach would entail a far more detailed inquiry into continuing, month-by-

month eligibility than is now necessary under the insurance benefits program. Moreover, although in our view presumptions are constitutionally permissible, they necessarily are only approximations and therefore would fail to satisfy the district court's apparent requirement that benefits not be "denied to a beneficiary who marries a person who can not provide a source of support to the beneficiary" (App. B, *infra*, pp. 13a-14a).

Alternatively, Congress could abandon the current method of allocating benefits on the basis of broad and easily applied presumptions, in favor of an individualized means test similar to that used for the allocation of welfare benefits. Such a change would work a drastic alteration in the fundamental character of Title II, for until now those provisions have "not purport[ed] to be general public assistance laws that simply pay money to those who need it most." *Mathews* v. *de Castro, supra* (slip op. 5). The decisions of this Court make plain that no such alteration in Title II is constitutionally required. See, *e.g.*, *Mathews* v. *de Castro, supra; Mathews* v. *Lucas, supra; Weinberger* v. *Salfi, supra.*

3. Congress has enacted a supplemental security income program, Title XVI of the Social Security Act, 42 U.S.C. (Supp. V) 1381 *et seq.*, under which appellee and his spouse have been receiving benefits each month since the program became effective in January 1974 (Stip. pars. 3, 6).[10] On remand, the

[10] "Stip." refers to the stipulation of facts on remand.

district court held that the supplemental security income program "simply ha[s] nothing to do with the questions presented" (App. A, *infra*, p. 3a). We believe that the provisions challenged here may be sustained as constitutional without reference to the existence of the supplemental security income program. But, contrary to the district court's holding, Title XVI does bear upon the issues presented here, for it underscores the reasonableness of the allocation of secondary social security benefits.[11]

Benefits under Title XVI are provided to aged, blind, and disabled individuals whose income and other resources are below statutorily prescribed levels. Section 1611, as added by the Social Security Amendments of 1972, 86 Stat. 1466-1468, 42 U.S.C. (Supp. V) 1382. Unlike the secondary benefits provisions of Title II, Title XVI is designed to allocate assistance on the basis of individualized determinations of need. Under this program, appellee and his wife receive only marginally less in federal assistance than they would have received had appellee's secondary child's benefits been continued (see p. 5, *supra*; Stip. pars. 3, 6, 13, 15). Congress has thus responded to and provided for the needs of appellee and other similarly situated individuals in a reasonable manner.

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[11] It also further demonstrates that in this area of social welfare, Congress has acted in the time honored tradition of legislative reform by moving one step at a time to address "the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1976.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20495-1

JOHN A. JOBST, PLAINTIFF,

vs.

DAVID MATHEWS, Secretary of Health, Education and Welfare, DEFENDANT

MEMORANDUM AND ORDER

The Supreme Court vacated the judgment of this Court, entered for reasons stated in *Jobst* v. *Richardson*, (W.D. Mo. 1974) 368 F. Supp. 909, and remanded this case "for reconsideration in light of 42 U.S.C. (Supp. II 1972) 1381, *et seq.* (86 Stat. 1329; Pub. L. No. 92-603 (Oct. 30, 1972)." Counsel for the plaintiff thereafter requested that this Court receive and consider evidence to be adduced by the parties prior to consideration of the effect of 42 U.S.C. §§ 1381, *et seq.*, on Mr. Jobst's claim for Child's Disability Benefits. After submission and answer of interrogatories, the parties entered into a stipulation of factual data and agreed that such data should be considered by this Court on remand.

The case was thereafter fully briefed by both sides. We have considered the undisputed factual circumstances and the briefs of the parties. We find and

conclude that the judgment originally entered should be and will be reinstated.

Although the Supplemental Security Income program was enacted by 42 U.S.C. § 1381, *et seq.*, on October 30, 1972, to become effective January 1, 1974, the Secretary apparently did not consider that that new legislation would have any impact upon the questions presented to this Court at the time the case was first here. Such question was never presented to this Court and was apparently raised for the first time in the Jurisdictional Statement filed in the Supreme Court in connection with the motion to dismiss or affirm.

The Secretary's brief on remand argues that "the recent enactment of additional remedial legislation in the form of Title XVI of the Act (SSI) must . . . be considered in analyzing the alleged discrimination contained in Section 202(d)(5) for this latest legislation by providing substantially equal cash benefits to individuals in plaintiff's situation modulates even the alleged discrimination of Section 202(d)(5)."

The first twenty pages of defendant's brief on remand, however, is basically a reiteration of arguments which we rejected when the case was first presented. On remand, it is argued in regard to the narrow question presented by the Supreme Court's order that "an equal protection analysis of the challenged sections must consider the inter-relationship of the challenged sections and evolution of the statu-

tory scheme which has now been capped by Title XVI."

We have carefully examined the briefs of the parties and studied the legislative history, such as it is, in connection with all the various sections of the United States Code involved in this case. We find and conclude that the enactment of the Supplemental Security Income program, 42 U.S.C. §§ 1381, *et seq.*, does not relate to the purposes supporting the Congressional enactment of the Child's Insurance Benefits Program, as originally enacted in 42 U.S.C. § 402(d). It is true, of course, that the accidental application of SSI payments improved plaintiff's payments to some degree. But under the judgment originally entered in this case, plaintiff would have a claim of back benefits in an amount of $9,215.80. We recognize that the Secretary maintains that this amount should be reduced by at least $3,314.20. We do not, at this time, get into the question of specific amounts.

We simply find and conclude that all action taken by the Secretary in this case was taken before the effective date of the Supplemental Security Income legislation and that, as was the Secretary's position before this Court at all times until remand, 42 U.S.C. §§ 1381, *et seq.*, simply had nothing to do with the questions presented.

We entertain the same view that the Court of Appeals for the Sixth Circuit entertained in *Fletcher* v. *Hous. Auth. of Louisville*, (6th Cir. 1975) 525

F. 2d 532, when, upon reconsideration of a case remanded the same day as was this case for further consideration in light of an amendment to the National Housing Act of 1937, that court concluded in *Fletcher* that the 1974 amendments to the National Housing Act did not shed any light on the old Act which would require a reversal of its earlier decision. That court, as does this Court, remains convinced that its prior holding was based on a correct interpretation of the legislation under actual consideration and that its original judgment should be reinstated.

Accordingly, and for the reasons stated, it is

ORDERED that the judgment originally entered in this case should be and the same is hereby reinstated.

/s/ John W. Oliver
District Judge

Kansas City, Missouri

July 27, 1976

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20495-1

JOHN A. JOBST, PLAINTIFF

v.

ELLIOT L. RICHARDSON, SECRETARY OF DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

MEMORANDUM AND ORDER

I

This case involves a challenge to a provision of the Social Security Act, 42 U.S.C. § 402(d), which, in effect, provides for child's insurance benefits for a child who marries a person who is eligible for Social Security benefits but discontinues child's insurance benefits for a child who marries a person who is ineligible to receive Social Security benefits.

Plaintiff contends that that provision, which forced the termination of his child's insurance benefits, is unconstitutional in that it denies him equal protection of the laws in violation of the Due Process clause of the Fifth Amendment. He prays for reinstatement of his child's insurance benefits, invoking the Court's jurisdiction under 42 U.S.C. § 405(g); a judgment declaring 42 U.S.C. § 402(d)(1)(D) unconstitutional; and a permanent injunction restraining defendant from enforcing 42 U.S.C. § 402(d)

(1)(D). We find and conclude that plaintiff is entitled to relief for reasons we shall state in detail.

II

On November 28, 1956, John A. Jobst, pursuant to 42 U.S.C. § 402(d), filed an application for child's insurance benefits based on the earnings record of his father. The Social Security Administration found that plaintiff had been disabled since birth because of cerebral palsy and awarded him benefits to commence January, 1957 (Tr. 61). In October, 1970, plaintiff advised the Social Security Administration that he had married Sandra Lee, who also has cerebral palsy and is permanently and totally disabled. (Tr. 36). Sandra Lee receives assistance from the Division of Welfare of the State of Missouri but does not receive Social Security Benefits (Tr. 36, 37).

On November 11, 1970, plaintiff was advised that his benefits would be terminated as of October, 1970, because of his marriage (Tr. 63). That termination was based upon the provisions of 42 U.S.C. §§ 402(d)(1) and (5), which provide for the termination of benefits to a disabled child beneficiary upon the beneficiary's marriage unless the beneficiary's spouse is also entitled to Social Security benefits.

Plaintiff requested a hearing, which was held in Kansas City, Missouri, on September 7, 1971 (Tr. 32, 33-45). The hearing examiner reversed the initial termination by the Administration and reinstated plaintiff's benefits for the following reason:

> Termination on the basis of marriage is arbitrary and without any rational basis, and therefore, violates the equal protection and due process clauses of the Constitution. Therefore, the claimant is entitled to continue drawing child's insurance benefits (disability). (Tr. 27).

The Appeals Council reviewed the hearing examiner's decision on its own motion. On June 22, 1972, the Council reversed the hearing examiner's ruling, concluding that a "quasi-judicial federal administrative agency" has no authority to consider the Constitution of the United States when it administers the Social Security Act. (Tr. 7). The Appeals Council further determined that it would not ask for recovery of the cover payments resulting from the hearing examiner's decision.

On August 18, 1972, plaintiff filed this action. The case was initially complicated by plaintiff's insistence that this case was one in which a three-judge court must be convened pursuant to 28 U.S.C. §§ 2242 and 2284. On May 11, 1973, we entered our memorandum and order denying plaintiff's application for the convening of a three-judge court. The case now pends on cross-motions for summary judgment.

We find and conclude that 42 U.S.C. § 402(d)(1)(D) as modified by 42 U.S.C. § 402(d)(5) and as applied by the Secretary to plaintiff is unconstitutional and that, therefore, the decision of the Appeals Council must be reversed.

III

The statutory scheme relevant to the question presented provides in material part:

Title 42, Section 402, United States Code:

> (d)(1) Every child (as defined in section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and
>
> (C) was dependent upon such individual—
>
> (i) if such individual is living, at the time such application was filed,
>
> (ii) if such individual has died, at the time of such death, or
>
> (iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,
>
> shall be entitled to a child's insurance benefit for each month, beginning with the first month

> after August, 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—
>
> (D) the month in which such child dies or marries.
>
> * * * * *
>
> (5) In the case of a child who has attained the age of eighteen and who marries—
>
> (A) an individual entitled to benefits under subsection (a), (b), (c), (f), (g), or (h) of this section or under section 423(a) of this title, or
>
> (B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,
>
> such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) . . . not be terminated by reason of such marriage; . . . .

The question presented is whether the Social Security Act's different treatment of various classes of child's insurance beneficiaries who marry violates the standards of the equal protection of the law embodied in the Due Process Clause of the Fifth Amendment. Other issues raised by the defendant in its brief, apparently in defense of what it thought would be argued by plaintiff, have not been raised by plaintiff and, therefore, there is no need to discuss them further.

It is indisputable that while the Fifth Amendment contains no specific equal protection clause, equal

protection standards have been found to be present in the due process clause of the Fifth Amendment if the federal statute manifested a "patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

It is equally clear that the Social Security Act is subject to scrutiny under standards of equal protection. The United States Supreme Court in *Richardson* v. *Belcher*, 404 U.S. 78 (1971), citing with approval its earlier decision in *Flemming* v. *Nestor*, *supra*, stated:

> We have held that "[t]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." [404 U.S. at 81].

Plaintiff argues that a strict equal protection standard should be applied in this case. He urges that the right to marry the person of one's choice is a fundamental right, citing *Loving* v. *Virginia*, 388 U.S. 1 (1969); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). He then relies upon *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), for the proposition that "any classification which serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."

We maintain serious doubt whether plaintiff's strict standard argument may be said to be tenable

in light of *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1972). Plaintiff attempts to build upon language in *Loving* and *Meyer*, which attests to the importance of marriage, to create a new constitutional right. In *Rodriquez*, however, the Supreme Court stated:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. [411 U.S. at 33].

We need not reach the strict standard question, however, for we find and conclude that the classification in question is not "rationally based and free from invidious discrimination" [*Dandridge* v. *Williams*, 397 U.S. at 487].

Defendant, at page 2 of its Supplemental Memorandum of Law, cites what it argues was the motive of Congress in drawing the classification of 42 U.S.C. § 402(d)(1)(D) and § 402(d)(5):

> The general rule providing that a married child applicant does not qualify for benefits and that a subsequent marriage will terminate entitlement is based on the general proposition that a married individual becomes the dependent of a spouse able to provide support. *Herzberg* v. *Finch*, 321 F. Supp. 1367 (S.D. N.Y. 1971). Accordingly, such beneficiary had no need of the benefits previously received; thus, such benefits could be terminated. It is submitted that there is a rational basis for Congress to make an ex-

ception to this rule in the case of a beneficiary receiving benefits on the wage record of another individual at the time of marriage who marries another beneficiary who is also receiving benefits on the wage record of another individual at the time of marriage, because it is unlikely that either of these beneficiaries would have any source of support other than their benefits. Thus Congress could assume—and it would be consistent with the Act—that those beneficiaries would not have a new source of support and would have need of their benefits, and could rationally make an exception to the rule in their case.

No Congressional history of the section of the Act in question is cited by either party, but assuming that this statement of Congressional intent is correct we may accept defendant's argument that such a purpose could be said to constitute a rational basis for the decision of Congress to discontinue benefits to those child's insurance beneficiaries who marry individuals who are able to provide a source of support to the beneficiary other than his benefits.

To say that Congress could have enacted a constitutionally valid statute is not to say that it did so. We find and conclude that Congress did not draw 42 U.S.C. § 402(d)(1)(D) and § 402(d)(5) in a manner so that the result of the application of those provisions in this case is consistent with what may have been an effort to establish a rational classification. We recognize, of course, that a classification may not properly be held to violate equal protection principles

because it "is not made with mathematical nicety or because in practice it results in some inequality." (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)), or "because [it] may be unwise, improvident, or out of harmony with a particular school of thought" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955)). We must recognize, however, that legislation must be drawn so that the distinctions made have "some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

The statute in question provides for the termination of the benefits of all child's insurance beneficiaries who marry persons who do not likewise receive child's benefits, regardless of whether they have a source of support other than their benefits. The obvious effect of the statute is to create a distinction between beneficiaries who marry disabled persons who do receive benefits and beneficiaries who marry disabled persons who do not receive benefits. The benefits of the former class of beneficiaries must be terminated, those of the latter class may not.

No rational basis for such a distinction has been suggested nor, we conclude, does one exist. The distinction between the two classes of beneficiaries has absolutely no relevance to the purpose for which the general classifications in the statute were drawn. Indeed, the statutory distinctions are antithectical to that purpose; they result in situations similar to the one here, in which benefits are denied to a beneficiary

who marries a person who can not provide a source of support to the beneficiary.

IV

The Secretary attempts to sustain the constitutionality of the statute as applied in this case by arguing that the principal classification intended by Congress—between beneficiaries who marry persons who are entitled to benefits and those who marry persons not entitled to benefits—which is intended to provide benefits only to those who marry persons not able to provide support, is not arbitrary and that, therefore, an unusual application of the statute, which results in an obviously unintended and unfair result, does not render it unconstitutional. Defendant ignores the fact, however, that the statutory language creates a distinction other than the one which is based upon a rational basis; that is, beneficiaries who marry disabled persons who do receive child's benefits and beneficiaries who marry disabled persons who do not receive child's benefits.

In *Stanley* v. *Secretary of Health, Education and Welfare*, 356 F. Supp. 793 (W.D. Mo. 1973), the statute involved provided for child's insurance benefits for children who are adopted after a parent becomes entitled to old-age benefits if the child is a natural child or stepchild, but not if the child bears no such relationship to the parent unless the following requirements are met: (1) the child was legally adopted before the end of the twenty-fourth month

following the month in which the parent became entitled to old-age benefits; (2) the child had been receiving at least one-half of his support from the parent for the year before the parent filed application for insurance benefits; and (3) the adoption proceedings were started in the month or before the month that the parent filed application for old-age benefits or the child was living with the parent in that month. Chief Judge Becker recognized that the distinction was drawn "with the purpose of preventing abuse of the Social Security Act by people who would otherwise adopt children solely to qualify them for benefits" [356 F. Supp. at 802].

In this case, however, the adopted parent was the child's grandfather in whose care the child had been placed by the natural parents. The child was not the natural child or stepchild of the adopted parent though, and he did not meet the alternative requirements for benefits. Judge Becker concluded that the statute, as applied in that case, violated equal protection principles:

> In the case at bar there is no permissible rational distinction between a natural son who may be illegitimate and a stepson who may not even be a blood relation on one hand and an adopted grandchild on the other hand. This is an arbitrary classification inconsistent with the purpose of the Social Security Act and a violation of the equal protection standards of the due process clause of the Fifth Amendment [346 F. Supp. at 805].

In *Stanley*, as in this case, there may have been a rational basis for the distinction created on the face of the statute. The statute operated, however, to create another distinction which was arbitrary and unrelated to the purpose of the statute.

The cases cited by defendant in support of his position that the statute in question is constitutional do not stand for that proposition. Neither *Herzberg* v. *Finch*, 321 F. Supp. 1367 (S.D. N.Y. 1971 nor *Judkins* v. *Richardson*, Civil No. 72-62 (D. Ore. 1972), dealt with the question of the constitutionality of § 402(d)(1)(D) and § 402(d)(5). In both cases the courts were asked to effectuate the intent of Congress and interpret the statute to permit continuation of child's insurance benefits to persons in the position of plaintiff in this case. In both cases the court refused to interpret the plain language of the statute, but they did not pass on the constitutionality of the statute as applied in those cases and this case. The question apparently was neither presented nor argued; certainly it was not ruled.

We therefore find and conclude that 42 U.S.C. § 402(d)(1)(D) and § 402(d)(5) are violative of principles of equal protection as incorporated in the Fifth Amendment to the Constitution as applied to a beneficiary who marries a totally disabled person who does not likewise receive child's insurance benefits.

For the reasons stated, it is

Ordered (1) that 42 U.S.C. § 402(d)(1)(D) and § 402(d)(5) as applied to child's insurance benficiaries who marry totally disabled persons who do not receive child's insurance benefits are hereby declared unconstitutional. It is further

Ordered (2) that the motion of the defendant Secretary of Health, Education and Welfare for summary judgment should be and the same is hereby denied. It is further

Ordered (3) that the decision of the Secretary should be and the same is hereby reversed. It is further

Ordered (4) that plaintiff's motion for summary judgment should be and the same is hereby granted and that this case should be and the same is hereby remanded for the sole purpose and with the express direction that plaintiff's claim be allowed.

JOHN W. OLIVER,
District Judge.

KANSAS CITY, MO., *January 14, 1974.*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Filed August 24, 1976]

Civil No. 20495-1

JOHN A. JOBST, PLAINTIFF

v.

F. DAVID MATHEWS, Secretary of Department of Health, Education & Welfare, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101 from the judgment of a single judge of the District Court entered in this action on July 27, 1976.

Dated at Kansas City, Missouri, this 24th day of August, 1976.

BERT C. HURN
United States Attorney

By /s/ J. Whitfield Moody
J. WHITFIELD MOODY
First Assistant
United States Attorney
(Member of the Bar of the United States Supreme Court)

OF COUNSEL

Tom Stout
Office of
General Counsel
Social Security
Administration

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed this 24th day of August, 1976, to:

J. D. Riffel
Litigation Unit
Legal Aid and Defender Society
of Greater Kansas City
1029 Oak Street
Kansas City, Missouri 64106

/s/ J. Whitfield Moody
J. WHITFIELD MOODY
First Assistant
United States Attorney

APPENDIX D

Section 202 of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. (and Supp. V) 402 provides in pertinent part:

(d) (1) Every child (as defined in section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and end-

ing with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

* * * * *

(5) In the case of a child who has attained the age of eighteen and who marries—

(A) an individual entitled to benefits under subsection (a), (b), (e), (f), (g), or (h) of this section or under section 423(a) of this title, or

(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,

such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage; * * *

* * * * *

(s)(2) * * * [S]o much of subsection[ ] * * * (d)(5) * * * of this section as precedes the semicolon, shall not apply in the case of any child unless such child, at the time of the marriage referred to therein, was under a disability * * *.

APPENDIX E

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Civil Action File No. 20495-1

JOHN A. JOBST, PLAINTIFF

vs.

DAVID MATHEWS, Secretary of Health, Education and Welfare, DEFENDANT

JUDGMENT

This action came on for determination before the Court, Honorable John W. Oliver, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the judgment originally entered in this case should be and the same is hereby reinstated.

Dated at Kansas City, Missouri, this 27th day of July, 1976.

/s/ [Illegible]
Clerk of Court

Attest: A true copy
R. F. CONNOR, Clerk
U.S. District Court
Western District of Missouri

by /s/ [Illegible]
Deputy

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